Supreme Court, U. S.
FILED
SEP 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO: 77-418

RONALD J. CALHOUN,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COMES NOW, Petitioner, by counsel, and files this, his Petition for a Writ of Certiorari, to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on 21 June, 1977.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the appendix hereto along with the Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on 21 June, 1977 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Where the United States, as employer, has unlawfully withheld the wages of an employee in a garnishment proceeding, is a United States Federal District Court a proper forum to which to address such a grievance?

2. What Constitutional rule governs administrative agencies of the federal government in defining "a court of competent jurisdiction" for the purpose of ordering the payment of alimony and chiid support; (1) service within the state or voluntary appearance, (2) domicile, (3) citizenship, (4) minimum contacts, (5) place of last marital abode, or (6) other?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV
* * * Deprivation of property,
without due process of law * * *

Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; * * *

Constitution of the United States, Article IV, Section 1.

Full faith and credit * * *

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, Section 659.

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed forces, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

Amended, effective June, 1977 by Public Law 95-30, which enacted certain regulations and other provisions pretaining to such process.

United States Code, Title 28, Section 1346.

United States as defendant.

(a) The district courts shall have origional jurisdiction, concurrent with the Court of Claims, of

(1) * * * * * * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidation or unliquidated damages in cases not sounding in tort.
* * * * * * * * *

REGULATIONS

Secretary of the Navy Notice 7200, dated 20 May, 1975

* * * * * * * * * * * * * * * * *

3. Policy.

a. It is the policy of the Department of the Navy to effectuate promptly, to the maximum extent permitted by prudent legal practice and the exigencies noted in subparagraph 3b below, the orders addressed to the United States or naval activities or officials in legal process issued under reference (a) by domestic State or Federal *courts of competent jurisdiction* for the enforcement, against the Federal pay of Department of the Navy personnel, of the legal obligations of personnel to provide child support or to pay alimony.

b. * * * * * * * * (emphasis mine)

STATEMENT OF THE CASE

Petitioner, Ronald J. Calhoun is a United States Navy Officer. His former wife, Mary Calhoun abandoned him and one of their two children and went to California. At the time Cdr. Calhoun was a student at the Naval War College at Newport, Rhode Island. On 18 July, 1975 Mrs. Calhoun obtained a divorce, which is embodied in an interlouctory decree of the Superior Court of the State of California for the County of San Diego. The face of the judgment shows that service of process was had in accordance with section 415.40 of the Code of Civil Proceedure, California, which provides for service by air mail, return receipt requested, where the person to be served is out of state. Service is deemed complete 10 days after mailing. Calhoun received the process papers at his home in Virginia, but did not answer or appear in the proceedings. In addition to granting Mary Calhoun a

divorce, and awarding her a total of $425.00 per month for alimony, child support and attorneys' fees, the judgment adjudicates the custody of the child Mary Calhoun abandoned, who was then living with his father in Virginia, and disposes of certain petitioner's property located in Virginia.

On 8 August, 1975 Mary Calhoun applied to the California Court for an order for issuance of Writ of Execution in the sum of $429.00, alleging no payment had been made. The court granted the application. The order, writ and notice of garnishment were served by mail on the United States at the Navy Family Allowance Activity (hereinafter referred to as Activity) at Cleveland, Ohio. A copy of the writ with a notice to the judgment debtor indicating a levy had been made on his wages was served on Calhoun by the San Diego County Marshal by mail. Two weeks later the Activity notified Calhoun that his pay had been levied upon. Calhoun's attorney informed the Activity, by letter, that the California Court had no *in personam* jurisdiction over him when it entered the Decree, and that the Decree being void, the garnishment writ was also void. The Activity had actual written notice that the California Court lacked *in personam* jurisdiction over Calhoun. Notwithstanding the Activity withheld the funds, whereupon this suit was filed in the United States District Court for the Eastern District of Virginia, Alexandria Division, the petitioner averring federal jurisdiction to be conferred by the Tucker Act, Section 1346 (a)(2), Title 28, U.S. Code, the amount in controversy being less than $10,000. Respondent answered, pleading as its sole defense that the garnishment writ was valid. After affidavits were filed by each party, the trial Court, without ruling on the validity of the California judgment, or the law to be applied in determining validity, granted respondent's Motion for Summary Judgment on the ground that the petitioner had no standing to litigate such matters in a United States District Court and the Court of Appeals for the Fourth Circuit

affirmed in a per curiam opinion, saying, "the question as to *in personam* jurisdiction will probably be whether Calhoun was a domiciliary resident or citizen of California".

REASONS FOR GRANTING THE WRIT

1. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

The Congress in enacting the federal garnishment statute (42 USC 659) waived sovereign immunity of the United States to garnishment of the wages of federal employees, where "legal process" is brought for enforcement against said employees of their "legal obligations" to provide child support or make alimony payments. The Congress amended this statute, effective 1 June, 1977 (Public Law 95-30), providing, in part, that "legal process" means any writ, order, summons or other similar process in the nature of garnishment which is issued by a "court of competent jurisdiction", and providing, further that the United States shall not be liable for any payment made pursuant to "legal process regular on its face", if such payment is made in accordance with the garnishment law and regulations issued to carry it out.

Secretary of the Navy Notice 7200, dated 20 May, 1975, a federal regulation regarding the garnishment of pay of naval personnel, states, in its preamble, "It is the policy of the Department of the Navy to effectuate promptly, * * * * * * * *, the orders addressed to the United States or naval activities or officials in legal process issued under 42 USC 659 by domestic state or federal *courts of competent jurisdiction* for enforcement, against the Federal pay of Department of the Navy personnel, of the legal obligations of personnel to provide child support or to pay alimony. * * * * * * * *" (emphasis mine)

Sovereign imminity was therefore not waived in those cases where the garnishment writ is issued by a court not of competent jurisdiction. Petitioner's position is that the California judgment and garnishment writ was void because the court was not one of competent jurisdiction and therefore did not qualify for the waiver of sovereign immunity under the statute or regulation. The Activity should not have given full faith and credit to it.

The sole issue raised by the litigants here was the validity of the California writ, but the Courts below did not decide the question, suggesting that the issue could be decided in the state court. While the petitioner was aggreved by the action of the state court in entering the judgment, which he claims is void, he was not adversely effected by it until the Activity acted affirmatively upon it. The California Court deprives petitioner of his property without due process of law and the Activity aids and abets the State Court by giving full faith and credit to its judgment. It is the action of the Activity for which petitioner seeks redress here, to which the Court below has closed the doors of the federal court system.

In the 1977 amendment to the basic federal garnishment statute, 42 USC 659 (f); Sec. 459 (f) of the Social Security Act, as amended; Congress anticipates that the United States would be sued by employees for errors and omissions of governmental agencies administering the statute, but limited such suits to those in which either the statute or the regulations were not followed.

The right of a principal defendant in a garnishment action to sue the garnishee in a separate action for unlawfully or wrongfully paying the principal defendant's wages to the garnishor is clearly the common law of this land. 6 Am Jur 2d Attachment and Garnishment Paragraph 400 reads, in part, "The courts are agreed that if the judgment in a garnishment proceeding is void, as, for example, where there is no jurisdiction acquired by the court, payment by the garnishee

is no protection to him against a subsequent action by his creditor." See also Chicago R.I. & P. Co. v. Sturm, 174 U.S. 710 (1899) and Wabash Railroad Co. v. Tourville 179 U.S. 322 (1900).

It is of vital importance that federal employees be able to obtain a judicial review when their wages are believed to be withheld unlawfully by administrative agencies of the federal government. Congress granted this right in 28 U.S.C. 1346 (a)(2), but the decision of the Court below has taken it away. The employee may not be right, but at least there ought to be a forum to which grievances may be addressed.

2. The Court below has decided a federal question in a way in conflict with applicable decisions of this Court.

The opinion and judgment of the Fourth Circuit reads as follows: "The face of the (California) judgment shows that service of process was had in accordance with California Code Sec. 415.40, which provides for service by air mail, return receipt requested, where the person to be served is out of state. Calhoun received the process papers at his home in Virginia, but he did not answer or appear in the proceedings. * * * * * * * * Service by mail was had in accordance with the California Code Sec. 415.20 (sic). The asserted invalidity is the California Court's lack of *in personam* jurisdiction over Calhoun. The question as to *in personam* jurisdiction will probably be whether Calhoun was a domiciliary resident or citizen of California."

In the case of Shaffer v. Heitner, 97 SCt 2569 (1977), this Court held that parties served with process outside a state, need only have minimum contacts with said state for *in personam* jurisdiction to attach.

Judges and lawyers are uncertain as to what law applies in defining a "court of competent jurisdiction" for the purpose of ordering the payment of child support or alimony. The last time this Court ruled on the jurisdiction of a state court to award or to cut off the right to alimony was in Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), which case calls for "service within the state or voluntary appearance". This rule seems to

have been modified in *Shaffer v. Heitner*, however. Arizona, New York, North Carolina and Missouri, among others, have limited their long arm statutes in alimony and child support situations to those cases in which the forum state was the "last marital abode"; Nickerson v. Nickerson, 542 P2nd 1131 (1975 Arizona); Lieb vs. Lieb, 381 NYS2nd 757 (1976); Sherwood vs. Sherwood, 223 SE2nd 509 (1976 North Carolina); Gaffney vs. Gaffney, 528 SW2nd 738 (1975 Missouri).

If the 14th Amendment is intended to afford some protection to a non resident, served with state court process by mail, certainly that person should be afforded the opportunity of knowing or being able to determine if the court issuing the process has personal jurisdiction over him. The California statute on this subject is so broad that it precludes this determination. Section 410.10 of the Code of Civil Proceedure, California, provides: "A court of this state may exercise jurisdiction on any basis not inconsistant with the Constitution of this state or of the United States". How can one, with any reasonable certainty know, from a reading of this statute, whether he is before the court or not?

It is submitted that the broad language used in the California jurisdictional statute deprives a non-resident, served out of state, by mail, of his 14th Amendment rights. Section 415.40 of the Code of Civil Proceedure, California, is equally offensive. It presumes that service is complete upon non-residents, 10 days after the mailing of process. Actual notice should be required to bring a non-resident before the court, furthermore, it takes longer than 10 days for mail to reach service men and diplomats stationed in distant places.

A good, definite understandable and workable Constitutional rule for jurisdiction in alimony and child support cases, is that which has been adopted by many states, i.e., in the absence of service within the state or voluntary appearance, the forum state must be the "last marital abode". This rule

precludes one spouse from shopping the country for a state with favorable divorce laws, and discourages the abandonment of the family, leaving their support to welfare.

3. The United States Court of Claims has before it a case with facts precisely like this one, and the results in this case ought not to be any different from that one.

Colonel Allan Wayne Morton, USAF has recently filed a suit (Docket No. 290-77) in the United States Court of Claims. The U.S. Air Force has honored a series of garnishment writs issued out of the Circuit Court for the Tenth Judicial Circuit of Alabama and has paid from Col. Morton's wages the sum of $5,850.00. The Alabama Court, in addition to awarding Mrs. Morton a divorce, ordered the payment of $500.00 per month alimony and child support. No personal service of process was made upon Col. Morton in Alabama and no appearance was made by him in the suit. The only service upon Col. Morton was by registered mail sent to him in Alaska. Col. Morton seeks a judgment against the United States in the sum of $5,850.00 with interest, attorney fees and court costs.

CONCLUSION

Aside from being both an important federal question which ought to be decided by this Court, and a case in which a federal Constitutional question has been decided in a way in conflict with previous decisions of this court, a definition of the obligations of governmental agencies administering the federal garnishment law is needed, as well as a forum to which greviences may be addressed by federal employees. Furthermore, if the case before the United States Court of Claims is decided differently than was this one, this Court ought to review the matter.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 76-1902

Ronald J. Calhoun
Appellant,

versus

The United States,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued February 16, 1977 Decided June 21, 1977

Before HAYNSWORTH, Chief Judge, BUTZNER and RUSSELL, Circuit Judges.

Francis B. Plattner for Appellant; Mark H. Gallant, Attorney, Department of Justice (Rex E. Lee, Assistant Attorney General; William B. Cummings, United States Attorney; Leonard P. Schaitman and Nathan M. Norton, Attorney, Department of Justice on brief) for Appellee.

PER CURIAM:

The Plaintiff, Ronald J. Calhoun, a United States Navy officer, sued the government to recover a portion of his pay which was withheld pursuant to a garnishment of his wages. The district court granted the government's motion for summary judgment.

On July 18, 1975, Calhoun's wife obtained a divorce which is embodied in an interlocutory judgment of the Superior Court of the State of California for the County of San Diego.

The face of the judgment shows that service of process was had in accordance with California Code §415.40, which provides for service by air mail, return receipt requested, where the person to be served is out of state. Calhoun received the process papers at his home in Virginia, but he did not answer or appear in the proceedings. Calhoun's attorney in the present action, both in the district court and on appeal, also was served. In addition to the divorce, the judgment awarded Mary Calhoun a total of $425.00 per month for alimony, child support and attorneys' fees.

On August 8, 1975 Mary Calhoun applied to the California court for an order for Issuance of Writ of Execution in the sum of $429.00, alleging no payment had been made. The court granted the application. The order, writ and notice of garnishment were served by mail on the United States at the Naval Family Allowance Activity at Cleveland, Ohio. A copy of the writ with a notice to the judgment debtor indicating a levy had been made on his wages was served on Calhoun by the San Diego County Marshal. Two weeks later the Activity notified Calhoun that his pay had been levied upon.

Calhoun's argument is that the money judgment against him is void because the California court did not have personal jurisdiction over him in the divorce action and, therefore, that the garnishment based on the void judgment is also void and the garnishee's payment is no defense to Calhoun's suit.

It is clear that the employer, on receipt of the garnishment notice, must give notice to its employee that it has been served so that the employee has the opportunity to defend himself. *See Harris v. Balk*, 198 U.S. 215 (1904). The employer has a greater obligation only where the underlying judgment is void on its face.

In this case, the divorce judgment is facially valid. Service by mail was had in accordance with the California Code §415.20. The asserted invalidity is the California court's lack of *in personam* jurisdiction over Calhoun. The question as to

in personam jurisdiction will probably be whether Calhoun was a domiciliary resident or citizen of California. Calhoun is assuredly in a better position to effectively litigate that issue than is the United States. The United States was under no duty to contest the judgment, exposing itself to potential double liabilities. It was Calhoun's obligation to attack the judgment if he wished to avoid the deduction from his pay.

The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 75-627-A

RONALD J. CALHOUN,

Plaintiff

v.

THE UNITED STATES,

Defendant

MEMORANDUM OPINION AND ORDER

The plaintiff brought this suit to enjoin the Secretary of the Navy from withholding any moneys due him and from

honoring the writ of attachment issued by the Superior Court of California in the case of Calhoun versus Calhoun, pursuant to 42 U.S.C. §659.

Presumably the prayer for the injunction was denied and/or abandoned although no such order has been entered herein – However, the suit has been amended whereby the plaintiff now sues under the Tucker Act, 28 U.S.C. §1346(a)(2), cliaming $314.00 to be due him under an agreement with the United States.

The Government has moved for summary judgment or, in the alternative, for a stay of all proceedings pending the determination of the defendant's liability on the plaintiff's claim in another forum, together with supporting affidavits and certified exhibits attached thereto.

The facts are not in dispute –

The plaintiff's wife obtained an interlocutory decree of divorce in July of 1975 in the Superior Court of California for the County of San Diego. In addition to the dissolution of the marriage this judgment awarded child support, alimony and attorney fees, to be paid at the rate of $75.00 a month. A final judgment of dissolution of the marriage was entered on October 14, 1975.

The plaintiff's wife alleged in the San Diego County Superior Court that the plaintiff had failed to make any of the payments required by the above mentioned judgment. The court ordered a writ of execution in the sum of $425.00 be issued to the sheriff or marshal of San Diego County. This order and writ, together with notice of garnishment, were served on the United States by mail at the United States Navy Family Activity in Cleveland, Ohio. A copy of the writ with "Notice to Judgment Debtor" indicating that a levy had been made on his wages was served upon the plaintiff by mail by the Marshal.

The plaintiff, a naval officer, was notified by his commanding officer that his pay had been levied upon and

that a portion of his pay had been suspended pursuant to the writ. The writ was returned unsatisfied – The Navy is withholding $363.94 from the plaintiff's pay.

Examination of the California court papers facially discloses that the writ of attachment was lawfully issued by the California court.

The plaintiff claims that the California divorce and the attendant writ of attachment are void because the California court never had jurisdiction over him – He concedes that he did not contest the divorce proceeding or the writ of attachment.

He further says that he does not intend to go to California or to authorize an attorney to contest these proceedings in California in his behalf – He contends that the United States is obligated to attack the divorce decree in his behalf – that their failure to so do gives them no defense to his Tucker Act claim.

The plaintiff's attorney also wants this Court to determine the validity of the plaintiff's California divorce.

No statute or authority has been cited requiring this Court to so do – Therefore the motion to hear and determine the validity of the California divorce is denied.

The writ of attachment issued by the California court pursuant to 42 U.S.C. §659 is facially valid – Therefore it should have been honored by the Secretary of the Navy – The plaintiff has been timely notified – The burden is on him to prove the claimed invalidity of the writ in the proper forum, if he be so advised.

The numerous authorities cited by the plaintiff's counsel are not in point.

The defendant's motion for summary judgment should be granted, and

It Is So Ordered.

The Clerk will send a copy of this memorandum opinion and order to all counsel of record.

/s/ Oren R. Lewis
April 16, 1976
United States Senior Judge